

Hearing Date: October 6, 2021 at 9:30 a.m. (AST)

Objection Deadline: September 21, 2021 at 4:00 p.m. (AST)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

In re:

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO
RICO,

as representative of

THE COMMONWEALTH OF PUERTO
RICO, *et al.*

Debtors.¹

PROMESA
Title III

No. 17 BK 3283-LTS

(Jointly Administered)

**MOTION OF THE OFFICIAL COMMITTEE OF RETIRED
EMPLOYEES AND ITS PROFESSIONALS TO COMPEL THE
PUERTO RICO DEPARTMENT OF TREASURY TO
COMPLY WITH THE FIRST AND SECOND AMENDED ORDERS
SETTING PROCEDURES FOR INTERIM COMPENSATION
AND REIMBURSEMENT OF EXPENSES OF PROFESSIONALS**

¹ The Debtors in these jointly-administered PROMESA title III cases, along with each Debtor's respective title III case number listed as a bankruptcy case number due to software limitations and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are: (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation (Bankruptcy Case No. 17 BK 3284) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric and Power Authority (Bankruptcy Case No. 17 BK 4780) (Last Four Digits of Federal Tax ID: 3747).

The Official Committee of Retired Employees of the Commonwealth of Puerto Rico (the “**Retiree Committee**”) and the Retiree Committee Professionals (defined below, and together with the Retiree Committee, “**Movants**”), respectfully file this motion (“**Motion**”) for entry of an order directing the Puerto Rico Department of Treasury, part of the Commonwealth’s central government (“**Hacienda**”), to comply with this Court’s First Amended Order Setting Procedures for Interim Compensation and Reimbursement of Expenses of Professionals (Dkt. 1715) (the “**First Amended Compensation Procedures Order**”), the Second Amended Order Setting Procedures for Interim Compensation and Reimbursement of Expenses of Professionals (Dkt. 3269) (the “**Second Amended Compensation Procedures Order**”, together with the First Amended Interim Compensation Order, the “**Compensation Procedures Orders**”), and the Court’s orders approving each of the Retiree Committee Professionals’ first eleven Interim Fee Applications (*see* Dkt. 1994, 3279, 3656, 4200, 5654, 7670, 8189, 9046, 9488, 12157, 13150, 13824, 14925, 15971, 17646) (the “**Interim Fee Orders**”). In support of this Motion, Movants state:

PRELIMINARY STATEMENT

1. Beginning in 2018 and continuing to the present, Hacienda has withheld 1.5% of Court-ordered fees payable to the Retiree Committee’s advisors: Jenner & Block LLP (“**Jenner**”); FTI Consulting, Inc. (“**FTI**”); Bennazar, García & Milián, C.S.P. (“**Bennazar**”); Segal Consulting (“**Segal**”); and Marchand ICS Group (“**Marchand**,” and together with Jenner, FTI, Bennazar, and Segal, the “**Retiree Committee Professionals**”).¹ These improper withholdings (the “**Improper Withholdings**”) are in addition to the 10% interim holdbacks under the Compensation Procedures Orders.

¹ As set forth herein, Hacienda first applied the improper withholding to Bennazar’s fees in 2018; Jenner’s and FTI’s fees in 2019; and Segal’s and Marchand’s fees in 2020.

2. There is no basis for the Improper Holdings. While Movants are aware of a tax that may apply to parties providing services to the Puerto Rico government, that tax is not applicable to the Retiree Committee Professionals. This is so because the Retiree Committee Professionals are not retained by the Commonwealth of Puerto Rico and do not provide services to the Commonwealth of Puerto Rico. Rather, the Retiree Committee Professionals are retained by and solely provide services to the Retiree Committee, which is created under the federal law of PROMESA, and appointed by the Office of the United States Trustee and, as such, is not an instrumentality of the Puerto Rico government.

3. The Retiree Committee Professionals have worked diligently to resolve the issues raised in this Motion without this Court's intervention. For over a year, the Retiree Committee Professionals have been in regular contact with Hacienda's counsel with the aim of resolving this improper withholding issue consensually. Despite the Retiree Committee Professionals' best efforts, however, Hacienda has failed to pay the Improper Withholdings that are due under the Compensation Procedures Orders and Interim Fee Orders. Accordingly, Movants seek entry of an Order compelling Hacienda to promptly pay to the Retiree Committee Professionals all of the Improper Withholdings, including but not limited to those set forth in the attached **Exhibit A**.

BACKGROUND

A. The Retiree Committee Professionals' Monthly Fee Statements and Interim Fee Applications Were Each Timely Submitted And Approved Pursuant to the Court's Compensation Procedures Orders

4. Under Orders of this Court, the Retiree Committee employed Jenner and Bennazar as its legal counsel, FTI as its financial advisors, Segal as its actuarial advisors, and Marchand as its Information Agent. (*See* Dkt. 1002, 1003, 1004, 1413, 1415 (the “**Retiree Committee Retention Orders**”).) Jenner, Bennazar, FTI, and Segal have been providing services to the Retiree Committee since June 2017. Marchand has been providing services to the Retiree Committee since July 2017.

5. On November 8, 2017, the Court entered the First Amended Compensation Procedures Order. Under paragraph 2.c of the Order, following the expiration of the 10-day period for objections to monthly statements, “the Debtors in whose cases such Professionals are retained and/or employed shall promptly pay, and in no event pay later than fourteen (14) calendar days after receiving the Monthly Fee Objection Statement, the Professional an amount equal to the lesser of (i) 90% of the fees and 100% of the expenses requested in the applicable Monthly Fee Statement. . . .” (First Amended Compensation Procedures Order ¶ 2.c.)

6. Under paragraph 2.f of the First Amended Compensation Procedures Order, Professionals may file Interim Fee Applications for interim Court approval and allowance of the payment of compensation and reimbursement of expenses sought by such Professional for each four-month Interim Fee Period—including any holdback of fees—under PROMESA section 317. (*Id.* ¶ 2.f.)

7. On June 6, 2018, the Court entered the Second Amended Compensation Procedures Order. The Second Amended Compensation Procedures Order contains the same procedures for

submitting monthly fee statements and receiving a 90% payment after the expiration of the 10-day objection period. (*Id.*)

8. Consistent with the Compensation Procedures Orders, the Retiree Committee Professionals timely served on the Puerto Rico Fiscal Agency and Financial Advisory Authority (“AAFAF”) and the Financial Oversight and Management Board (the “FOMB”), as well as the other notice parties, monthly statements (the “**Monthly Statements**”) for the fees and expenses incurred on behalf of the Retiree Committee. (Second Amended Compensation Procedures Order ¶ 2.) The Retiree Committee Professionals also timely filed Interim Fee Applications, which the Court approved under the Interim Fee Orders.²

9. Notably, the Commonwealth of Puerto Rico, through AAFAF, is an active party in these Title III cases and supported the Compensation Procedures Orders. AAFAF never took the position that the Compensation Procedures Orders should include a 1.5% tax.

B. Hacienda’s Improper Withholdings.

10. Since 2018, Hacienda has failed to comply with the Compensation Procedures Orders in one key respect: it has erroneously and arbitrarily implemented the Improper Withholdings, deducting 1.5% of the Retiree Committee Professionals’ fees due under the Court’s Compensation Procedures Orders and Interim Fee Orders.³ The Improper Withholdings total hundreds of thousands of dollars and include, but are not limited to, the amounts set forth in **Exhibit A**.⁴

² The Retiree Committee Professionals’ Twelfth Interim Fee Applications were filed on July 15, 2021 and are set to be heard at the October 6, 2021 omnibus hearing. (See Dkt. 17363, 17364, 17366, 17369, 17371.)

³ Hacienda began improperly withholding Bennazar’s fees in June 2018 and began withholding fees from the other Retiree Committee Professionals in 2019 or 2020, as reflected herein.

⁴ Monthly Statements and Interim Fee Applications are paid on a rolling basis, and the Retiree Committee Professionals reserve all rights to all such withheld amounts, regardless of whether they are reflected in this Motion.

11. For more than a year, the Retiree Committee Professionals attempted to engage Hacienda's counsel on this issue. Through letters, e-mails, and phone calls, the Retiree Committees' Professionals questioned the Improper Withholdings and sought to obtain an explanation for Hacienda's actions. Most recently, on July 19, 2021, the Movants sent a letter to Hacienda's counsel, requesting resolution of the issue (the "**July 19 Letter**") and explaining that, if the issue could not be resolved consensually, Movants would seek this Court's assistance. A copy of the July 19 Letter is attached hereto as **Exhibit B**. Unfortunately, the only response from Hacienda, through counsel, to the July 19 Letter were a few statements indicating that Hacienda was evaluating the Improper Withholdings.

12. Although Hacienda has not cited any support for the Improper Withholdings, the Movants suspect that Hacienda is relying on Determinación Administrativa Núm. 13-14, *Aclaración al alcance de la imposición de la aportación especial bajo la ley Núm.48-2013* (Aug. 28, 2013), available in Spanish at <http://www.hacienda.pr.gov/sites/default/files/publicaciones/2014/05/13-14.pdf> ("**Determination 13-14**"). An unofficial English translation of Determination 13-14 is attached as **Exhibit C**.⁵

13. Determination 13-14 provides that Puerto Rico Act 48 of 2013 ("**Act 48**") "imposes a special contribution equivalent to one point five percent (1.5%) of the total amount of all contracts" of "professional, advisory, advertising, public relations, communications, legal, training or orientation, and lobbying services" provided to "an agency, dependency or instrumentality of the Commonwealth of Puerto Rico . . . , public corporation, as well as the Legislative Assembly and the Judicial Branch." In short, the "special contribution" contemplated by Determination 13-

⁵ The Retiree Committee has filed a motion contemporaneously herewith requesting an extension of time to file a certified English translation of Administrative Determination 13-14 in accordance with Local District Rule 5(c).

14 and Act 48 applies only to parties providing services to the Commonwealth of Puerto Rico and its instrumentalities.

14. Determination 13-14 does not apply to the Retiree Committee's Professionals. The Retiree Committee Professionals do not provide services to the Commonwealth of Puerto Rico or its instrumentalities; rather, they provide services to the Retiree Committee, which is an entity created under the federal law of PROMESA, appointed by the Office of the United States Trustee. *See Notice of Appointment of Official Committee of Retirees in the Commonwealth of Puerto Rico* (Dkt. 340) (appointing Retiree Committee under 11 U.S.C. § 1102(a)(1) (made applicable under 48 U.S.C. § 2161(a)); *Retiree Committee Retention Orders* (authorizing the Retiree Committee's retention of the Retiree Committee Professionals under 11 U.S.C. §§ 105(a), 1102(b)(3), and 1103(a) (each made applicable under 48 U.S.C. § 2161(a)).

RELIEF REQUESTED

15. By this Motion, Movants respectfully request the entry of an Order directing Hacienda to comply with the Court's Compensation Procedures Orders and Interim Fee Orders and to pay all Improper Withholdings to the Retiree Committee Professionals, on or before October 15, 2021.

16. The Retiree Committee Professionals have provided necessary and valuable services to the Retiree Committee and complied fully with the Compensation Procedures Orders and Interim Fee Orders. This Court's Compensation Procedures Orders and Interim Fee Orders do not permit Hacienda to arbitrarily refuse to pay professionals' fees. Hacienda's failure to pay is in direct conflict with the mandates of this Court's Orders, and Hacienda should be compelled to promptly pay all fees due to the Retiree Committee Professionals.

WHEREFORE, the Retiree Committee and the Retiree Committee Professionals respectfully request entry of an Order, substantially in the form in the attached **Exhibit D**: (a) directing Hacienda to comply with the Compensation Procedures Orders and Interim Fee Orders and to pay all Improper Withholdings to the Retiree Committee Professionals, on or before October 15, 2021; and (b) granting to the Retiree Committee Professionals such other relief as may be just.

September 14, 2021

Respectfully submitted,

JENNER & BLOCK LLP

BENNAZAR, GARCÍA & MILIÁN, C.S.P.

By:

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